

Ninth Circuit's Grokster Decision Changes the Law of Secondary Copyright Liability

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The U.S. Court of Appeal for the Ninth Circuit's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.* represents a dramatic break with governing precedent in the area of secondary copyright liability. In *Grokster*, the Ninth Circuit affirmed the trial court's ruling granting summary judgment for defendants based on the "decentralized" nature of the peer-to-peer ("P2P") networks at issue in that case. In so doing, however, the Ninth Circuit articulated new standards for imposing contributory and vicarious copyright liability that will make it more difficult for copyright owners to combat Internet piracy.

The *Grokster* case involved P2P networks that generate advertising revenue from users who can exchange media files with other users. As noted by the Ninth Circuit, evidence was presented that at least 90 percent of the files on the defendant services at the time of the lower court's ruling constituted infringing copies of protected music, motion pictures and television programs.

New Threshold Test and Time Component For Proving Contributory Infringement. To establish liability for contributory infringement,

In *Grokster*, the Ninth Circuit concluded that the defendants' services were capable of substantial noninfringing uses, notwithstanding the fact that, as noted in a footnote, plaintiffs had contended that, at most, only 10 percent of the files on defendants' services were noninfringing at the time the trial court granted summary judgment for defendants. The Ninth Circuit emphasized that the relevant inquiry focused on the potential for noninfringing use - not actual use - and also suggested (in a footnote) that 10 percent legitimate use was nonetheless substantial because it represented "hundreds of thousands of legitimate file exchanges."

In so ruling, the Ninth Circuit acknowledged that its interpretation of what constitutes a substantial or commercially significant noninfringing use is at odds with the Seventh Circuit's analysis in *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003), but distinguished that case on the grounds that no evidence was presented in *Aimster* that the *Aimster* product had any actual or potential noninfringing uses. The Ninth Circuit also side-stepped the question of whether the *Sony-Betamax* decision

cause they arrived when defendants did "nothing to facilitate and [could not] do anything to stop" individual acts of infringement. On similar grounds, the Ninth Circuit found that plaintiffs could not show that defendants' contribution to their users' infringement of plaintiffs' copyrights was material.

This unprecedented reformulation of the test for contributory infringement - that cause and effect occur simultaneously - encourages potential infringers to separate artificially their contribution to infringement (at which time they have "knowledge" under this test) from the point in time when an infringing copy is actually made.

Rejection of the "Turning A Blind Eye" Theory and Imposition of a Temporal Component For Imposing Vicarious Liability. With respect to vicarious infringement - which requires a showing that a defendant (1) had the right and ability to supervise the direct infringers and (2) received a direct financial benefit - the Ninth Circuit similarly adopted the trial court's analysis in finding that at the moment of infringement defendants did not have the ability to block access to individual users. In so ruling, the

